

U.S. Senate
Republican Policy
Committee

Don Nickles, Chairman
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Legislative Notice

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Conference Report to S. 1, Unfunded Mandate Reform Act of 1995

Reported from the conference committee on March 13, 1995; H. Rept. 104-76.

NOTEWORTHY

- By unanimous consent, the Senate will take up the conference report to accompany S. 1, with three hours for debate, equally divided, following Senator Byrd's remarks on H.R. 889. A vote will occur on the conference report on Wednesday.
- The conference report generally agrees with the Senate-passed bill, with several changes, the most significant of which are the addition of limited judicial review of agency statements, a requirement that federal agencies pursue the least burdensome option, and the change in the threshold for CBO review of private sector costs from \$200 million to \$100 million.

SUMMARY

- S. 1, the Unfunded Mandates Reform Act of 1995, introduced by Senator Kempthorne, was reported by the Governmental Affairs and Budget Committees on January 9, 1995, and passed the Senate on January 27, 1995 by a vote of 86-10. The House passed its version of S. 1 on February 1. The act was reported by the committee of conference on Friday, March 10.
- The act requires the Congressional Budget Office (CBO) to prepare estimates of the cost of federal mandates on state, local, and tribal governments and on the private sector. The bill also requires federal agencies to include cost/benefit estimates in proposed or final regulations that impose costs of \$100 million a year or more on state, local, and tribal governments, or the private sector.

- The conference report provides a 51-vote point of order in the Senate to lie against consideration of any legislation (other than for appropriations bills) that imposes federal mandates if the total cost imposed by the bill on state, local, and tribal governments is \$50 million or more, or if the total cost imposed by the bill on the private sector is \$100 million or more, (Senate-passed threshold was \$200 million) unless the CBO statements are published by the committee before Senate consideration, and unless the bill contains proposals that provide a mechanism to cover the direct compliance costs of state, local, and tribal governments.
- The conference report generally adopts the Senate-passed enforcement mechanism for meeting future mandate costs with appropriations. If there are insufficient appropriations to cover the mandate's compliance costs, the agency must make recommendations to Congress for implementing a less costly mandate or making the mandate ineffective for that fiscal year. The mandate expires if the Congress, acting on an expedited basis, does not enact agency recommendations.
- The conference report provides for limited judicial review on the narrow issue of whether or not the agency issued the required statements, but the judiciary may not review the adequacy of the content of the statements.

Congressional Consideration of Costs of Federal Mandates

CBO Required to Prepare Statements

- The bill imposes the following requirements on the CBO, effective for legislation considered after January 1, 1996, or 90 days after appropriations are made to CBO for purposes of complying with this bill, whichever date is earlier.

Bills Reported by Committee:

The following requirements apply to CBO with respect to all bills and joint resolutions, other than appropriations bills, reported by House or Senate committees. The CBO is not required to prepare the following statements if the Director of CBO determines that it is not feasible to make the following estimates, and informs the committee that a reasonable estimate cannot be made:

- **Intergovernmental Mandates:** CBO must prepare a statement including estimates of the direct costs that will be incurred by State, local, or tribal governments in complying with the federal mandates ("intergovernmental mandates") imposed by the bill. If the Director of the CBO determines that the direct costs of the intergovernmental mandates in the bill will be below \$50 million annually, he must say that in his statement to the committee on the bill and include a brief explanation.

If the Director of CBO determines the direct costs of compliance with all the federal intergovernmental mandates to be \$50 million or more per year during any year of the first five years the mandate would be in effect, he must include the following estimates:

1. Total direct costs of complying with the Federal intergovernmental mandates;
 2. The amount of new budget authority, if the bill contains an authorization for appropriations, for each fiscal year for a period not to exceed 10 years beyond the effective date of the mandate; and
 3. Any increase in the bill in authorization of appropriations for federal financial assistance programs usable by the states, local governments, and tribal governments to offset the mandates.
- **Private Sector Mandates:** CBO must estimate the direct costs of federally imposed private sector mandates in each bill. If the Director determines that the direct costs will be below \$100 million per year, then he shall so state with an explanation.

If the Director determines the direct costs of compliance with the federal private sector mandates to be \$100 million or more, he must include the following estimates:

1. Total direct costs of the Federal private sector mandates, broken out on an annual basis over the five-year period beginning with the first year the mandate becomes effective; and
 2. Any increase in the bill in authorization of appropriations for Federal financial assistance programs usable by the private sector for activities subject to the Federal private sector mandates.
- **Other Studies Requested by Committees:** At the request of congressional authorizing committees, the CBO shall, to the extent practicable, consult with and assist such committees in analyzing budgetary and financial impacts of proposed legislation. At the request of any committee chairman or ranking member, the Director shall, to the extent practicable, conduct a study of a legislative proposal containing a federal mandate, including future costs of the mandate beyond the five-year time frame, if such estimates are reasonably feasible.

Senators' Amendments:

At the written request of a senator, CBO shall, to the extent practicable, prepare an estimate of the direct costs of an intergovernmental mandate contained in the amendment of such senator. The House has separate provisions for House amendments.

Conference Reports:

With respect to bills in conference in which either the House or Senate bill has been amended to increase the federal mandate above the level considered by either House, the "committee of conference shall ensure, to the greatest extent practicable," that the CBO shall prepare a supplemental statement.

Analysis of the Cost of Regulations:

At the request of any committee chairman or ranking member, CBO shall, to the extent practicable, prepare a comparison between an estimate made by an agency of the costs of regulations implementing an act containing a federal mandate and the cost estimate prepared by CBO for that act when it was being considered by Congress.

- The bill repeals section 403 of the Congressional Budget Act of 1974, which requires the CBO to provide estimates of the cost to State and local governments of the bills. The repeal is effective January 1, 1996.
- The bill authorizes \$4.5 million per year for Fiscal Years 1996 through 2002 for CBO to carry out the new requirements.

Committee Reports to Include CBO Estimates and Financing Statement

- Each committee report accompanying legislation that imposes a federal mandate must contain a statement prepared by the committee that includes:
 - a description of any federal mandates in the bill and the expected direct costs of the mandates to state, local, and tribal governments, and to the private sector;
 - a qualitative assessment of the costs and benefits of the federal mandates, including their anticipated costs and benefits to human health and safety and protection of the natural environment; and
 - a statement of the extent to which Federal payment of public sector costs would affect the competitive balance between state, local, or tribal governments, and privately owned businesses.
- If the bill contains intergovernmental mandates, then the committee report must also contain:
 - a statement of the amount, if any, of the increase or decrease, in authorization of appropriations available under existing federal financial assistance programs or

authorized by the bill for activities of state, local, or tribal governments subject to the federal intergovernmental mandates in the bill;

- a statement whether the intergovernmental mandates are partly or entirely unfunded, and the committee's reasons for that intention;
 - a statement identifying the funding, and explaining whether the committee has created a mechanism to allocate the funding "reasonably consistent" with the anticipated direct costs of state, local and tribal governments in meeting the mandates; and
 - identification of any existing sources of federal assistance to meet the direct costs of state, local and tribal governments.
- The committee must state the extent to which the reported legislation preempts state, local, or tribal law, and if so, why.

Provides a Point of Order

- A majority (51-vote) point of order will lie in the Senate and the House against consideration of any bill, joint resolution, motion, amendment, or conference report (other than provisions in or amendments to appropriations bills that do not increase direct costs of a federal intergovernmental mandate) that contains a federal unfunded mandate, unless:
 - a report by a committee accompanying such bill contains the estimates required of the CBO with respect to direct compliance costs of the bill's federal mandate on state, local, and tribal governments and on the private sector; and
 - if the federal mandate is an intergovernmental mandate in excess of \$50 million in annual direct cost, the bill, amendment, motion, or conference report has provided full funding to the state, local, and tribal governments by way of:
 1. an increase in direct spending (in the Senate; the House must contain sufficient budget authority or new entitlement authority) at least equal to the direct costs of such mandate;
- or
2. an increase in authorization of appropriations, and a requirement that the implementing agency must notify Congress each fiscal year whether there is sufficient appropriations to meet the direct cost of such mandate. If the agency finds there are insufficient appropriations, then it must recommend to Congress legislative changes needed to meet or reduce the direct cost of the mandate. These proposals will be considered by Congress under expedited procedures. The mandate shall cease to be effective 60 days after the date the responsible federal agency has

submitted legislative recommendations, if those recommendations are not passed or Congress otherwise provides by law.

- Upon a point of order being made and sustained by the Chair, the specific provision shall be deemed to be stricken from the bill, and may not be offered as an amendment on the Senate floor.

Categories of Laws Exempted from the Bill's Requirements

- The act exempts from the requirements of this bill any legislation or regulation that implements the following categories of federal mandates:
 - federal civil rights and disability rights;
 - individual Constitutional rights;
 - federal accounting requirements with respect to grant programs;
 - emergency assistance or relief requested by state, local or tribal governments;
 - national security/ratification of international treaties;
 - bills designated by the President as emergency legislation that the Congress also designates in statute.
- The act also does not apply to legislation or amendments that affect taxes to fund the old-age, survivors, and disability insurance program under title II of the Social Security Act.

Federal Agencies Must Estimate Costs of Federal Mandates

- For all proposed and final rules, the federal agencies must provide a statement that **must include** estimates of the direct cost of compliance with the federal intergovernmental mandates on state, local and tribal governments and the private sector, including the availability of federal funds to pay for those costs.
- For proposed and final rules that result in an annual expenditure in excess of \$100 million in any one year by state, local, and tribal governments in the aggregate, or by the private sector, the federal agencies' economic impact analysis **must include**:
 - an identification of the agency's legal authority to promulgate the regulation;

- a qualitative and a quantitative assessment of costs and benefits to the state, local, and tribal governments or the private sector, as well as the effect of the federal mandate on health, safety, and the natural environment;
- an analysis of federal funding available to meet intergovernmental mandates;
- a description and summary of the prior consultation with, and comments received from state, local, and tribal governments, and by other affected parties, along with the agency's evaluation of those comments; and
- "to the extent that the agency determines that accurate estimates are reasonably feasible," the following:
 1. an estimate of future costs of the intergovernmental mandate, and any disproportionate budgetary effects on any particular regions of the United States, particular governments, or other types of communities;
 2. estimates of the future compliance costs of the federal mandate and any disproportionate budgetary effects of the mandate upon particular regions of the nation or particular state, local, or tribal governments or communities, or particular segments of the private sector;
 3. the effect of the federal mandate on the national economy, such as the effect on productivity, economic growth, full employment, creation of productive jobs, and international competitiveness of United States goods and services.
- Agencies shall develop plans to notify and advise small governments before establishing any regulatory requirements that might significantly or uniquely affect small governments.
- Agencies must select "the least costly, most cost-effective or least burdensome alternative" that achieves the objectives for rules that contain either intergovernmental or private sector mandates.
- OMB must review agency compliance with this act and report annually to Congress.

Limited Judicial Review for Certain Agency Requirements

- The bill specifically provides for limited judicial review of the compliance or noncompliance of an agency with respect to the act's requirement to prepare a statement to accompany economically significant regulatory actions, and to develop a plan to notify and allow input from small governments when the rule significantly or uniquely affects small governments. The review provided must be under section 706 of the

Administrative Procedures Act, and the remedy must be limited to compelling the agency to prepare the written statement, estimate, analysis, or written plan required by this act.

- In judicial review under other federal laws, the inadequacy of the agency statement shall not be the basis for staying, enjoining, invalidating, or otherwise affecting such agency rule. However, any information generated by the agency may be considered as part of the record in a judicial review brought under another statute. The judicial review provisions of this act shall become effective on October 1, 1995, and shall apply only to rules that are issued as proposed rules after that date.

New Commission to Study Intergovernmental Mandates

- The bill creates an "Advisory Commission on Intergovernmental Mandates" to study Federal intergovernmental mandates and make recommendations to the President and Congress regarding additional flexibility for compliance, reconciling contradictory mandates, terminating or consolidating duplicative or obsolete mandates, and temporarily suspending costly mandates not vital to public health and safety. The recommendations shall also address the mitigation of negative impacts that may be shifted to the private sector by relieving state, local, and tribal governmental mandates, and the feasibility of applying relief from federal mandates for the private sector to the same extent as relief is applied to state, local, and tribal governments. Additionally, the recommendations shall address any negative impact on the private sector that may result from implementation of the recommendations with respect to reducing intergovernmental mandates. A preliminary report is due within nine months of the date of enactment, with a final report due three months later.
- The bill authorizes \$500,000 for each of fiscal years 1995 and 1996 to the Advisory Commission.

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